Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

ALAN D. BARIBEAU, M.D., ET. AL.,

Petitioners

v.

LYNN GUSTAFSON

Respondent

On Petition For a Writ of Certiorari
To the Fourth District Texas Court of Appeals and
the Texas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The district court jury (in a medical negligence action) awarded $500 in compensatory fraud damages and $250,000 in exemplary fraud damages. The jury also awarded $126,784.93 in compensatory damages resulting from medical negligence and battery, which damages the jury found were not caused by the fraud. Summary judgment was granted in favor of Petitioners on the issue of exemplary damages based on the medical negligence and/or battery. The district court applied Texas Civil Practice and Remedies Code section 41.008(b), "capping" the jury's award of exemplary damages at the minimum amount required under Texas law, $200,000. The questions presented to this Court include:

1. Whether application of the Texas exemplary damages "cap" -- section 41.008(b) of the Texas Civil Practice and Remedies Code – results in an unconstitutionally excessive exemplary damages award and violates Petitioners' due process rights under the Fourteenth Amendment?

2. Whether the opinion of the court of appeals conflicts with this Court's opinions in *BMW, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm v. Campbell*, 538 U.S. 408 (2003), where the *de novo* review:

(a) failed to limit reprehensibility review to the conduct and harm resulting from fraud, the sole basis for the award of exemplary damages?

(b) failed to ensure that the measure of punishment (400-to-1 ratio) was both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered? and

(c) failed to consider comparable civil monetary penalties?

PARTIES TO THE PROCEEDING

Petitioners are Alan D. Baribeau, M.D., and Alan D. Baribeau, M.D., P.A., Individually and d/b/a Cataract and Laser Institute, and Center for Laser Enhancement. The Respondent is Lynn Gustafson.

RULE 29.6 STATEMENT

Petitioners have no parent corporation and no publicly held company owns more than a 10% stock interest.

RULE 29.4(C) CERTIFICATION

28 U.S.C. § 2403(b) may apply – a copy of this petition will be served on the Honorable Greg Abbott, Attorney General of the State of Texas.

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... -I-

PARTIES TO THE PROCEEDING ..... -II-

RULE 29.6 STATEMENT ..... -II-

RULE 29.4(C) CERTIFICATION ..... -II-

TABLE OF CONTENTS ..... -III-

TABLE OF AUTHORITIES ..... -X-

OPINIONS BELOW ..... -1-

JURISDICTION ..... -2-

CONSTITUTIONAL & STATUTORY PROVISIONS .. -2-

STATEMENT ..... -2-

A. Underlying Facts ..... -2-

B. The Jury Verdict ..... -4-

C. Rule 14.1(g)(i) Preservation ..... -5-

D. The Court of Appeals Addressed the Constitutionality of the Exemplary Damages .... -6-

REASONS FOR GRANTING THE PETITION ..... -7-

I. Certiorari is Warranted to Illuminate the Constitutional Excessiveness Review of the Texas Statute Providing a Minimum Amount of Exemplary Damages ..... -9-

II. This Case Warrants Certiorari to Illuminate the Application of the *Gore* Standard in the Multiple-Tort Context, Where Only One Tort Imposes Liability for Exemplary Damages, and the Harm

Resulting from Each Tort is Held to Be Separate and Distinct ..... -11-

III. Certiorari is Warranted to Review the Court of Appeals' Opinion Which Conflicts With This Court's Requirements to Establish Due Process Under the Fourteenth Amendment ..... -13-

A. The Court of Appeals' Misapplication of the *Gore* Guideposts Violates Due Process and Conflicts with both *Gore* and *Campbell* ..... -13-

1. In Examining Factors Jury Instructed to Consider in Assessing Reprehensibility, the Court of Appeals Erroneously Considered Conduct Causing Harm for Which No Exemplary Damages were Awarded (Medical Negligence and Battery) Rather than Limiting Consideration to Conduct Causing Harm for Which Exemplary Damages were Awarded (Fraud) ..... -15-

a. Courts Conducting *De Novo* Review Must Consider Gravity of Conduct That Caused Harm For Which Exemplary Damages Awarded ..... -15-

b. Court of Appeals Considered Gravity of Conduct Causing Harm Unrelated to Harm Jury Found Caused by Fraud ..... -16-

c. Review of the Conduct Causing Harm Does Not Establish High Degree of Culpability Warranting Substantial Exemplary Damages Award ..... -19-

2. Court of Appeals Erroneously Upheld Exemplary Damages as Constitutional Where Award was Unreasonable and Disproportionate to Amount of Harm Caused by Fraud ..... -20-

3. Court of Appeals Erroneously Disregarded Comparable Civil Monetary Penalties, Focusing on Possible Disciplinary Procedures, in Conflict with *Gore* and *Campbell* ..... -23-

CONCLUSION ..... -25-

TABLE OF AUTHORITIES

Cases **Page(s)**

BMW, Inc. v. Gore,
517 U.S. 559 (1996) 1, 5, 11, 14, 15, 16, 21, 22

Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,
532 U.S. 424 (2001) 8, 14

Gasperini v. Center for Humanities, Inc.,
518 U.S. 415 (1996) 14

Honda Motor Co. v. Oberg,
512 U.S. 415 (1994) 14

Pacific Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 14

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003)
. . . . . 1, 8, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 23, 25

TXO Production Corp. v. Alliance Resources Corp.,
509 U.S. 433 (1993) 14, 21

Statutes & Rules **Page(s)**

28 U.S.C. § 1257(a) 2
§ 2403(b) ii

FLA. STAT. ANN. § 768.73 (West 2003) 8

IDAHO CODE § 6-1604 (Michie 2003) 8

IND. CODE § 34-51-3-4 (generally) 8

KAN. STAT. ANN. § 60-3702 (2003) 8

MONT. CODE ANN. § 27-1-220 (2003) 8

NEV. REV. STAT. § 42.005 (2003) 8

N.J. STAT. ANN. § 2A:15-5.14(b) (2004) 8

N.C. GEN. STAT. §1D-25(b) (2003) 8

N.D. CENT. CODE § 32-03.2-11(4) (2003) 8

OKLA. STAT. ANN. tit. 23, ch. 1, § 9.1(c) (2003) 8

40 PA. CONS. STAT. §1303.505 (2004) 8

R.I. GEN. LAWS § 10-7-2 (2004) 8

S. CT. R. 14.1(g) 5

TEX. ST. BD. MED. EX. R. 165.1(a) 24
165.1(d) 23
190.1(c) 23
190.1(d) 23
190.14 24

TEX. BUS. & COMM. CODE § 17.46(2), (3), (4), (5), (24) (Vernon 2002) 24

TEX. CIV. PRAC. & REM. CODE. ANN. § 41.002(b) 9, 10
§ 41.003(a) 13
§ 41.008(b) 1, 2, 5, 9, 10

U. S. CONST. amend. 14, § 1 2

VA. CODE ANN. § 59.1-338(B) (Michie 2003) 8

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PETITION FOR WRIT OF CERTIORARI

Alan D. Baribeau, M.D., and Alan D. Baribeau, M.D., P.A., Individually and d/b/a Cataract and Laser Institute, and Center for Laser Enhancement respectfully petition for a writ of certiorari to review the judgment of the Fourth District Texas Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Fourth District Court of Appeals in San Antonio, Texas (App. 1a-17a) is published at 107 S.W.3d 52. The judgment of the Fourth District Court of Appeals in San Antonio, Texas (App. 18a) is unpublished. The judgment of the district court (App. 19a-22a) is unpublished. The Texas Supreme Court order denying the petition for review (App. 23-24a) is unpublished, as is the order denying the motion for

rehearing of the denial petition for review. (App. 25-26a).

JURISDICTION

The Court of Appeals issued its opinion on March 12, 2003. (App. 1a). Petitioners timely petitioned the Texas Supreme Court for review of that decision, which review was denied on January 30, 2004. (App. 23a-24a). The Petitioners then timely petitioned the Texas Supreme Court for rehearing. The Texas Supreme Court denied rehearing on the Petitioner's petition for review on April 9, 2004. (App. 25a-26a). This Court has jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL & STATUTORY PROVISIONS

Section One of the Fourteenth Amendment of the United States Constitution provides that "... nor shall any State deprive any person of life, liberty, or property, without due process of law ..." U.S. CONST. amend. 14, § 1.

The relevant provisions of the Texas law—TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon Supp. 2001)—are reproduced in the appendix. (App. 27a-28a).

STATEMENT

A. Underlying Facts

Petitioner Dr. Baribeau is an ophthalmologist who performed Erbium laser skin resurfacing in May 1997. On May 30, 1997, the Respondent, Ms. Gustafson met with Dr. Baribeau, seeking treatment to even up depigmented skin tone and loss of freckles following a CO2 laser procedure she had undergone in 1996 at Walter Reed Medical Center in Washington, D.C. She also sought a blepharophasty, or eyelid surgery to remove wrinkles caused by the aging process, and to repair a torn earlobe. Dr. Baribeau suggested an eyelid tuck as well as Erbium laser procedure to even her facial pigment. Although both

procedures were scheduled for June 10th, only the Erbium laser was performed. After Ms. Gustafson was anesthetized, Dr. Baribeau realized the consent form only referenced the Erbium laser and not the eyelid tuck and he decided against performing the eyelid tuck that day.

Ms. Gustafson followed up with Dr. Baribeau one week later. When shown her broken capillaries and oozing sores, Dr. Baribeau informed Ms. Gustafson that she could expect a four-month healing period. At that appointment, Ms. Gustafson signed a consent form for the eyelid tuck and for additional Erbium laser surgery on a small scar on her chin. Both procedures were scheduled for June 24th.

According to Dr. Baribeau and Juanita Loya, the nurse present that day, Ms. Gustafson requested a full-face Erbium laser treatment the morning of the procedure. Dr. Baribeau also testified that even though Ms. Gustafson did not sign a consent form for the second full-face procedure, she verbally consented. Dr. Baribeau claimed that her skin was sufficiently healed by June 24th to perform the full-face Erbium procedure, and he described Ms. Gustafson's lack of written consent as a clerical error.

Ms. Gustafson denied that she requested the second full-face procedure and argued that she expected only the procedures to which she gave her written consent–the eyelid tuck and the limited Erbium laser on her chin. She testified that when she spoke with Dr. Baribeau the morning of the surgery, he stated that he would do the eyelid tuck but would not use the Erbium laser at all. According to Ms. Gustafson, Dr. Baribeau said that he would treat the scar on her chin with steroid injections instead. She testified that at the June 17th appointment, Dr. Baribeau told her no further Erbium laser treatments could be performed until her face completely healed, a period he

estimated at four months. Ms. Gustafson contended the second surgery caused scarring on her face

Ms. Gustafson testified that before the second procedure, Dr. Baribeau told her he would not be using the Erbium laser at all. On the other hand, Dr. Baribeau testified that, based on Ms. Gustafson's request, he intended to perform a full-face procedure the morning of June 24th. Ms. Gustafson also testified that the first treatment left her skin in such bad condition that she would not have undergone the second surgery had she known that Dr. Baribeau intended to perform a second full-face procedure.

Ms. Gustafson also contended that Dr. Baribeau altered records, in an effort to conceal his earlier misrepresentations. To support that allegation, she pointed to the fact that the operative report from her first procedure was missing, including the "after" photos which would have purportedly shown the condition of Ms. Gustafson's face one week before the second procedure. She also produced conflicting documents from her medical records.

B. The Jury Verdict

At trial, the jury found that Dr. Baribeau's negligence proximately caused Ms. Gustafson's injury in that Dr. Baribeau performed full-face resurfacing without Ms. Gustafson's consent (medical battery) (App. 32-33a); and Dr. Baribeau committed fraud against Ms. Gustafson. (App. 35-36a).

The jury awarded Ms. Gustafson $126,784.93 for damages caused by Dr. Baribeau's negligence and medical battery. (App. 38-39a). The jury also found that Dr. Baribeau committed fraud against Ms. Gustafson, separately awarding $500 in pecuniary fraud damages (App. 42-43a), and, because it found clear and convincing evidence of fraud, it further awarded $250,000 in exemplary fraud damages. (App. 44-46a). The jury failed to

find any personal injury damages resulting from the fraud. The trial court applied Texas Civil Practice & Remedies Code section 41.008(b) (App. 27a-28a) to "cap" the exemplary damages award at $200,000, (App. 20a), and otherwise rendered judgment on the jury's verdict. (App. 19a-22a).

The Court of Appeals explained that Ms. Gustafson's battery injuries were awarded for an unwanted touch of her body with the Erbium laser during the second procedure, (App. 10a), while her fraud injuries stemmed from her reliance on Dr. Baribeau's assurance that he would not use the Erbium laser during the second surgery. (App. 10a). The Court of Appeals concluded the injuries resulting from Ms. Gustafson's reliance on Dr. Baribeau's misrepresentations (*i.e.*, the fraud damages) were thus separate and distinct from the injuries arising from Dr. Baribeau's unauthorized bodily contact (*i.e.*, the medical negligence and battery damages). (App. 10a).

C. Rule 14.1(g)(i) Preservation

Petitioners contended in their motion for new trial that the award of $200,000 exemplary damages minimum limit contained within section 41.008(b) of the Texas Civil Practice and Remedies Code is grossly excessive and an unconstitutional violation of due process, pursuant to the Fourteenth Amendment analysis set out by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559. (Def. Mot. New T. 16-20). The trial court denied Petitioners' motion for new trial. (App. 49a).

At every stage in the appellate proceedings Petitioners continued to argue that the $200,000 exemplary damages minimum limit contained within section 41.008(b) was grossly excessive and resulted in an unconstitutional violation of Fourteenth Amendment due process. (*See* S. Ct. R. 14.1(g)(i); B. Appellants Tex. Ct. App. 31-48; Pet'r Pet. for Rev. Tex. S.Ct. 4-8, 12-14; Pet'r B. on Merits Tex. S.Ct. 9-31).

D. The Court of Appeals Addressed the Constitutionality of the Exemplary Damages

The Court of Appeals specifically addressed the challenge to the exemplary damages award on the ground that it deprived Dr. Baribeau of due process under the Fourteenth Amendment to the United States Constitution. (App. 14a). There the Court of Appeals acknowledged that an exemplary damages award could violate a party's substantive due process right to protection from "grossly excessive" damages, citing this Court's opinion in *Gore*. (*Id.*). The Court of Appeals conducted a *de novo* review of the record to consider each factor the jury was instructed to consider in assessing the reprehensibility of Dr. Baribeau's conduct and the amount of exemplary damages. Even though the jury awarded $-0- for these factors as the result of fraud, the court concluded that the personal injuries awarded as a result of medical battery alone (scarring, disfigurement, future corrective surgery, emotional scarring), in part, constituted evidence sufficient to sustain the award of exemplary damages. The Court of Appeals -- after determining that the fraud was the but-for cause of the medical battery (which alone resulted in personal injuries) -- determined that the $200,000 exemplary damages award was constitutional, even though the actual damages resulting from the separate and distinct tort of fraud were only $500. (App. 14a-17a).

The Court of Appeals further addressed Dr. Baribeau's assertion that the ratio between the damages required a reduction in the exemplary damages award. (App. 15a-16a). The Court of Appeals characterized that argument as the "punishment should not fit the conduct, but instead should only fit the damages awarded." (App. 15a). In rejecting Dr. Baribeau's ratio challenge the Court of Appeals opined that anything less than a 400-1 ratio "would pervert the purpose of the exemplary damages scheme." (App. 16a). Rather than focusing on whether the measure was both reasonable and

proportionate to the amount of harm of Ms. Gustafson and to the general damages awarded, the Court of Appeals concluded that "effectuating the purposes of exemplary damages is of paramount importance and eclipses any concern about reducing the ratio between exemplary and actual damages. (App. 16a n.4). The Court of Appeals concluded that the $200,000 exemplary damages were "necessary to effectuate the purposes of exemplary damages and that reducing the amount [would not] punish or deter [Dr. Baribeau's] egregious conduct." (App 16a).

The Court of Appeals determined the high ratio was "necessary to teach a duty of care and deter future bad acts." (App. 16a n.4). For that reason, the Court of Appeals believed the $200,000 exemplary damages were proportional to the $500 actual damages. (App. 16a).

The Court of Appeals concluded by examining comparable civil penalties Dr. Baribeau could have faced. Rather than examining a comparable monetary fine, the Court of Appeals opined that Dr. Baribeau's actions "may be grounds for discipline by the Board of Medical Examiners." (App. 17a). The Court of Appeals then concluded that the $200,000 exemplary damages was a less severe punishment than suspension or revocation of Dr. Baribeau's medical license. (App. 17a). For that reason alone, the Court of Appeals believed the exemplary damages award survived *Gore*'s third guidepost. (App. 17a).

REASONS FOR GRANTING THE PETITION

In addition to Texas, at least thirteen states have enacted statutory "caps" and statutory minimum for punitive damages

awards.[1] On numerous occasions, this Court has instructed that "Despite the broad discretion that states possess with respect to the imposition of . . . punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion."[2] This case involves Texas' statutory capping provision, which sets both a maximum and a minimum amount of punitive damages that may be awarded in this context, and specifically, involves the constitutional excessiveness review of the statutory minimum, and presents the Court with several reasons for granting the petition for certiorari.

First, through this case, the Court can illuminate the application of the *Gore* guideposts in reviewing for constitutional excessiveness the punitive damage awards that are "capped" at statutory minimums. Second, this Court may also illuminate the application of the *Gore* guideposts in reviewing a case involving multiple torts resulting in separate and distinct compensatory damage awards, but involving only one of those torts resulting in the award of exemplary damages.

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[1] *See* FLA. STAT. ANN. § 768.73 (West 2003); IDAHO CODE § 6-1604 (Michie 2003); IND. CODE § 34-51-3-4 (generally), § 34-18-14-3 (1998) (med mal cases); KAN. STAT. ANN. § 60-3702 (2003); MONT. CODE ANN. § 27-1-220 (2003); NEV. REV. STAT. § 42.005 (2003); N.J. STAT. ANN. § 2A:15-5.14(b) (2004); N.C. GEN. STAT. § 1D-25(b) (2003); N.D. CENT. CODE § 32-03.2-11(4) (2003); OKLA. STAT. ANN. tit. 23, ch. 1, § 9.1(c) (2003); 40 PA. CONS. STAT. § 1303.505 (2004); R.I. GEN. LAWS § 10-7-2 (2004); VA. CODE ANN. § 59.1-338(B) (Michie 2003).

[2] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

Third, the case involves the opinion of the Texas intermediate appellate court which conflicts with this Court's opinions in *Gore* and *Campbell* because the court below misapplied the traditional *Gore* analysis in reviewing the minimum amount of punitive damages allowed under Texas law by. Those conflicts, of which review has been denied by the Texas Supreme Court, include: (1) failing to limit the reprehensibility guidepost analysis to the harm for which exemplary damages were assessed (fraud); (2) failing to conduct the analysis of the five factors this Court has instructed in *Gore* and in *Campbell* to be considered in determining the reprehensibility of the misconduct; (3) failing to address the disparity between the compensatory fraud damages and the exemplary fraud damages; and (4) failing to analyze comparable civil monetary penalties that could have provided notice to Dr. Baribeau of the punishment allowed.

For all these reasons, review is compelled.

I. Certiorari is Warranted to Illuminate the Constitutional Excessiveness Review of the Texas Statute Providing a Minimum Amount of Exemplary Damages

Chapter 41 of the Texas Civil Practice and Remedies Code provides that the maximum amount of punitive damages to be awarded against a defendant are computed as the *greater* of (a) two times economic damages, plus non-economic damages not to exceed $750,000, or (b) $200,000. TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.002(b), 41.008(b)[3] (Vernon Supp. 2001). Thus, subject to other provisions not relevant here, the statutory limitation sets a *minimum* amount of exemplary damages that

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[3] Although Chapter 41 was amended in 2001 and 2003, the statutory minimum amount of exemplary damages awarded here was not changed.

may be assessed under Texas law at $200,000. *See id.* § 41.008(b). The Texas Legislature has determined that Chapter 41 prevails over all other law to the extent of any conflict. *Id.* § 41.002(c).

Here, the jury awarded $250,000 exemplary damages, based solely on the basis of its finding of clear and convincing evidence of fraud (App. at 44-46a); indeed, the trial court granted Dr. Baribeau's motion for partial summary judgment on the issue of malice with respect to the medical negligence and battery claims and the jury was never asked to consider or assess the reprehensibility of Dr. Baribeau's conduct in relation to those separate and distinct torts. The trial court reduced the exemplary damages award to $200,000 in accordance with section 41.008(b) of the Texas Civil Practice and Remedies Code – a ratio of 400-to-1. (App. 20a). The court of appeals reviewed the statutory minimum for excessiveness. (App. 11-17a).

Even given the discretion afforded to Texas and the other states in setting statutory maximums and minimums capping punitive awards, the setting of a bright line amount of punishment or automatic minimum punishment that applies "across the board," cannot escape the guarantees of federal due process. That these bright lines exist do not guarantee constitutional due process.

This Court should grant review to illuminate the application of the *Gore* guideposts when reviewing the statutory minimum or maximum amounts of punitive damage awards. Here, the court of appeals summarily performed the *de novo* review, almost as if reaching its conclusion that $200,000, the statutory minimum, would meet federal due process requirements, and then backtracking to support that conclusion with uninformed analysis. As discussed more completely below, to affirm the statutory minimum, the court relied on the separate and distinct

harm resulting from the medical negligence and battery for which no exemplary damages were awarded. It also failed to apply the second guidepost, opting instead to focus on the reprehensibility of the misconduct. Finally, under the third guidepost, the court of appeals completely ignored Dr. Baribeau's tender of comparable civil monetary penalties and summarily concluded that the excessive punitive damages would be preferable to a licensing disciplinary proceeding.

Petitioners urge that courts cannot assume that state statutes setting minimum awards for punitive damages automatically meet the due process requirements of the Federal Constitution, but rather, courts must apply the *Gore* guideposts in accordance with the guidance provided by this Court. These statutory minimums do not automatically purport to exact constitutional due process, and, indeed, Petitioners contend here that the statutory minimum is grossly excessive. For this reason, this case warrants certiorari.

II. This Case Warrants Certiorari to Illuminate the Application of the *Gore* Standard in the Multiple-Tort Context, Where Only One Tort Imposes Liability for Exemplary Damages, and the Harm Resulting from Each Tort is Held to Be Separate and Distinct

This Court has not considered the constitutionality of the award of exemplary damages in the context of a multiple-tort case, where the jury finds one tort imposes liability for exemplary damages (here, fraud), the other torts do not (here, medical negligence and battery), and the harm resulting from each tort is separate and distinct. *See, e.g., Campbell*, 538 U.S. at 416 (involving torts giving rise to exemplary damages included fraud and bad faith in claims adjusting); *Gore*, 517 U.S. at 564-65 (involving tort of fraud in nondisclosure of auto repairs giving rise to exemplary damages).

Here, the Court of Appeals, in analyzing the factors the jury was instructed to consider in assessing the reprehensibility of Dr. Baribeau's conduct and the amount of exemplary damages, discussed, in part, the nature of the wrong and the character of the conduct. (App. at 11-17a). The court held that in considering the reprehensibility-type factors, the injury or harm caused by medical negligence and battery, for which no exemplary damages were assessed, nonetheless, supported the amount of the award.[4] (App. 11-17a). The court justified its analysis by further concluding that the fraud was the "but-for" cause of the medical negligence and battery damages. (App. 13a).

This Court has instructed that the reprehensibility analysis, however, involves the consideration of the reprehensibility of the *conduct that caused the harm for which exemplary damages were assessed*. *Campbell*, 538 U.S. at 422-24. A defendant should not be punished for being an unsavory individual or business. *Id.* at 423. The court of appeals' consideration of harm resulting from medical negligence and battery interjected the personal injury damages the jury expressly found were not caused by the fraud, and, moreover, interjected conduct for which the jury was instructed not consider. (App. at 46a). Medical negligence and battery, as found by the jury, resulted in separate and distinct damages and, moreover, they did not

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[4] Importantly, however, the jury was instructed in Question 10 to consider factors *only* in connection with the fraudulent conduct (Question 9) as that conduct was the sole conduct giving rise to the imposition of exemplary damages. The factors included: (a) the nature of the wrong; (b) the character of the conduct; (c) the degree of culpability of the wrongdoer; (d) the situation and sensibilities of the parties concerned; (e) the extent to which such conduct offends a public sense of justice and propriety; and (f) the net worth of Dr. Baribeau. (App. 46a).

involve conduct for which punishment was required under Texas law. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (requiring exemplary damages to be awarded only if claimant proves by clear and convincing evidence that harm with respect to which claimant seeks recovery of exemplary damages results from fraud, malice, or wilful act or omission or gross neglect).

Thus, this Court can illuminate the standards and application of the *Gore* guideposts in a case such as this, involving multiple torts, but where only one of those torts gives rise to the imposition of punishment through the award of exemplary damages. Petitioners contend that the *Gore* guideposts should be applied, but that they should be applied through analysis of the sole tort giving rise to the award of exemplary damages. Otherwise, Petitioners and other similarly situated defendants can and will be punished for conduct that was not, under the prevailing legal standards, conduct that gives rise to punishment under the state law. Here, Petitioners believe the exemplary damages were affirmed based on the personal injuries that the jury determined were caused solely by the medical negligence and battery. But, under Texas law, no punishment could be imposed for that medical negligence and battery. Thus, certiorari is warranted.

III. Certiorari is Warranted to Review the Court of Appeals' Opinion Which Conflicts With This Court's Requirements to Establish Due Process Under the Fourteenth Amendment

A. The Court of Appeals' Misapplication of the *Gore* Guideposts Violates Due Process and Conflicts with both *Gore* and *Campbell*

This Court has consistently held that while states possess discretion over the imposition of punitive damages, there exist procedural and substantive constitutional limitations on these

awards.[5] The Due Process Clause of the Fourteenth Amendment of the United States Constitution "prohibits a State from imposing a grossly excessive punishment on a tortfeasor." *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Under *Gore*, even if an assessment of punitive damages is not deemed excessive under governing state law, it may violate a party's substantive due process right to protection from "grossly excessive" punitive damages awards. *Gore*, 517 U.S. at 562; *see also Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) (noting that *Gore* provides "an ultimate federal constitutional check for exorbitancy" for punitive damages). To the extent that an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property. *Campbell*, 538 U.S. at 417.

Under *Gore*, the focus lies on whether a defendant received fair notice that his conduct was prohibited and notice of the potential penalty for engaging in the conduct. *See Gore*, 517 U.S. at 574-75; *see also Campbell*, 538 U.S. at 417. Three guideposts have been established for assessing whether defendants received adequate notice of the potential magnitude of the punitive damages award: (1) the degree of reprehensibility of defendant's conduct; (2) whether the punitive damages award bears a reasonable relationship to the compensatory damages award; and (3) comparing the punitive damages award to civil or criminal penalties that could be imposed for comparable conduct. *Gore*, 517 U.S. at 575. Courts are mandated to conduct *de novo* review of these

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[5] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (citing, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 433 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

guideposts to the jury's award. *Campbell*, 538 U.S. at 418 (considering $1 million award of compensatory damages for "a year and a half of emotional distress," and reversing $145 million award of exemplary damages [145-to-1 ratio] as grossly excessive).

Here, the jury awarded $500 in compensatory pecuniary loss damages and $250,000 in exemplary damages, resulting from fraud. (App. 43a, 46a). The trial court applied section 41.008(b), to compute the capped amount of exemplary damages to be awarded against Dr. Baribeau at $200,000, the statutory minimum. (App. 20a). This resulted in a 400-to-1 exemplary fraud damages to compensatory fraud damages ratio.

Petitioners contend that application of this statutory cap on exemplary damages results in an unconstitutionally excessive award, and that regardless of the legislative computation that precludes award of exemplary damages in a lower amount, such an excessive award violates due process rights under the Fourteenth Amendment of the United States Constitution.

1. ***In Examining Factors Jury Instructed to Consider in Assessing Reprehensibility, the Court of Appeals Erroneously Considered Conduct Causing Harm for Which No Exemplary Damages were Awarded (Medical Negligence and Battery) Rather than Limiting Consideration to Conduct Causing Harm for Which Exemplary Damages were Awarded (Fraud)***

   a. **Courts Conducting *De Novo* Review Must Consider Gravity of Conduct *That Caused Harm For Which Exemplary Damages Awarded***

The most important indicium of the reasonableness of an exemplary damages award is the degree of reprehensibility of the defendant's conduct. *Campbell*, 538 U.S. at 419; *Gore* 517 U.S. at 575. This Court has instructed courts to determine the

degree of reprehensibility of the conduct of a defendant by considering whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Campbell*, 538 U.S. at 419; *Gore*, 517 U.S. at 576-77. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain an exemplary damages award; and the absence of all renders any award suspect. *Campbell*, 538 U.S. at 419. This Court has also instructed that in considering the reprehensibility guidepost, the court may consider the instructions provided to the jury in assessing the reprehensibility of the misconduct. *Id.* at 418.

In examining the reprehensibility issues in *Campbell*, this Court emphasized that the fundamental reason exemplary damages were unconstitutional there was because the "courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm." *Campbell*, 538 U.S. at 422 (out-of-state conduct in handling its claims). While such conduct (even if dissimilar) may be probative as to the deliberateness and culpability of the defendant's action, the conduct "*must have a nexus to the specific harm suffered by the plaintiff.*" *Id.* (emphasis added). Indeed, "[a] defendant should be punished for the conduct *that harmed the plaintiff*, not for being an unsavory individual or business." *Id.* at 423 (emphasis added). Thus, the conduct causing harm for which exemplary damages were awarded was the only conduct relevant to the reprehensibility analysis. *Id.* at 424.

b. Court of Appeals Considered Gravity of Conduct Causing Harm Unrelated to Harm Jury Found Caused by Fraud

The Texas court of appeals held that Ms. Gustafson's recovery for both fraud and medical battery did not violate the one satisfaction rule. (App. 10a). In so holding, the court explained that in her recovery for negligence and battery, the jury awarded her damages of $126,788.93 for past physical pain and mental anguish, medical expenses, disfigurement, and loss of earnings and earning capacity. *Id.* But, the court also recognized that the jury awarded only $500 for past pecuniary loss from Dr. Baribeau's alleged fraud. *Id.* The court further explained:

> Lynn's battery injuries are that an unwanted touch of her body occurred. Her fraud injuries stemmed from her reliance on Baribeau's assurance that he would not use the Erbium laser during the second surgery. The injuries resulting from Lynn's reliance on Baribeau's misrepresentations are *separate and distinct* from her injuries arising from Baribeau's unauthorized bodily contact.

Id.

Thus, even as the court of appeals recognized, the damages resulting from fraud, as found by the jury, were purely economic and did *not* include any physical harm. On the other hand, the damages resulting from the negligence and battery findings included personal injury damages of physical pain and mental anguish, medical expenses, and disfigurement. The damages were separate and distinct, and, the jury was asked, but failed to find, any personal injury damages resulted from the fraud. Consequently, the damages the jury found resulted from fraud ($500 pecuniary loss) were the only damages having a

"nexus to the specific harm suffered by" Ms. Gustafson. *See Campbell*, 538 U.S. at 422.

Nonetheless, in conducting its *de novo* review, the court of appeals considered the factors the jury was instructed to consider in determining reprehensibility and assessing the amount of exemplary damages. First, the court considered that the nature of the wrong refers to the injury or harm caused by the defendant's actions. (App. at 12a). The court of appeals improperly, and in conflict with *Campbell*, emphasized Ms. Gustafson's disfigurement (scars, depigmentation) and future reconstructive surgeries to correct the scars, as well as emotional scars, and concluded that the harm caused by Dr. Baribeau's "actions" was "severe and permanent." (App. 12a).

Next, the court also reviewed the jury's instruction to consider character of Dr. Baribeau's conduct and the degree of his culpability. Here, the court of appeals discussed the misrepresentation of the number of Erbium procedures he previously performed, which, the court concluded was "especially harmful" because he should have known the length of time required for skin to heal between the procedures. (App. 12a). The court also discussed the misrepresentation about performing additional work with the Erbium laser during the second surgery. (*Id.*). This, the court concluded, essentially prevented Ms. Gustafson from making an informed choice about her medical treatment. (*Id.* at 12-13a). Thus, she was subjected to treatment to which she did not consent and which was performed negligently. The court concluded that a "but for" cause of her medical negligence and battery damages (which caused personal injuries) was the fraud. (*Id.* at 13a).

Third, the court analyzed the jury's instruction to consider the situation and sensibilities of the parties, the net worth, and attempted to weigh the profitability of the wrongful conduct and the size of the award necessary to punish and deter that conduct.

(App. 13a). Although the record contained no evidence of net worth or the amount of profit from performing the second procedure, the court again considered the conduct – the alteration of medical records. The court concluded that to properly punish the malfeasance and deter others from breaching a patient's trust, the exemplary damages award was appropriate and necessary. (*Id.*).

Further, the court concluded the conduct offended the public's sense of justice and propriety: (1) the misrepresentations prevented Ms. Gustafson from making informed choices about her medical care; and (2) although he testified it is never proper to alter medical records, Dr. Baribeau admitted that records had been changed (to correct sentence structure – characterized by the court of appeals as language that "placed him on higher legal ground"). (App. 15a). Finally, the court of appeals summarily concluded the deliberate misleading of Ms. Gustafson and the attempt to conceal misrepresentations through altering the records were reprehensible and supported the exemplary damages award. (*Id.*).

c. Review of the Conduct Causing Harm Does Not Establish High Degree of Culpability Warranting Substantial Exemplary Damages Award

However, a review of the aggravating factors that should have been considered shows: (1) the harm resulting from fraud was purely economic and was not physical; (2) the misrepresentations did not evince an indifference to or a reckless disregard of the health or safety of others; (3) No evidence existed of Ms. Gustafson's financial vulnerability; and (4) the misrepresentations were not repeated, but rather, this was an isolated incident. Petitioners acknowledge that the finding of fraud involves trickery or deceit, however, the

existence of this factor weighing in favor of Ms. Gustafson is not sufficient to sustain the $200,000 exemplary damages award. *See Campbell*, 538 U.S. at 419.

The court of appeals' analysis should have been limited to the misrepresentations (the bases for fraud) and the harm caused by them ($500 pecuniary loss). The court of appeals erroneously considered the personal injuries, emotional scarring that the jury expressly found were *not* the result of the fraud. (App. at 42-43a). Indeed, in answer to Question 8, the jury awarded $-0- damages for personal injury resulting from fraud. (App. at 42-43a). Given that the jury expressly assessed the harm caused by fraud as $500 past pecuniary loss, the court of appeals erroneously included within its *de novo* review the analysis of the conduct causing harm unrelated to the fraud.

Thus, the court of appeals misapplied the *Gore* analysis and its opinion conflicts with this Court's pronouncements in *Gore* and *Campbell*, emphasizing that the analysis of reprehensibility is limited to that conduct resulting in the harm for which exemplary damages have been awarded. *See Campbell*, 538 U.S. at 419.

As discussed, the harm caused by Dr. Baribeau's alleged fraud was separate and distinct from the harm caused by the alleged negligence and battery. The harm resulting from fraud, as found by the jury was the $500 past pecuniary loss. Because the jury specifically failed to find any damages for disfigurement, physical pain and mental anguish, medical expenses, or loss of earnings/earning capacity in connection with the fraud, the court of appeals' analysis of this factor conflicts with the requirements of *Campbell*, and violates Petitioners' due process under the Fourteenth Amendment.

2. *Court of Appeals Erroneously Upheld Exemplary Damages as Constitutional Where Award was Unreasonable and Disproportionate to Amount of Harm Caused by Fraud, in Conflict with Gore and Campbell*

The court of appeals' analysis of the second *Gore* guidepost, the relationship between the punitive damages award, the harm likely to result from the defendant's conduct, as well as the harm that has actually occurred, also results in an erroneous misapplication of *Gore* and the opinion conflicts with both *Gore* and *Campbell*. *Gore*, 517 U.S. at 581-82 (involving a failure to disclose claim for fraud) (citing *TXO*, 509 U.S. at 458). This second guidepost embraces the long-recognized principle that exemplary damages must bear a reasonable relationship to the compensatory damages. *See Gore*, 517 U.S. at 580. Indeed, the comparison between the compensatory award and the punitive award is "significant." *Id.* at 581.

This Court has explained that few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. *Campbell*, 538 U.S. at 425. Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500-to-1, as in *Gore*, or even in the case of 145-to-1. *Id.* (concluding that a presumption exists against an award that has a 145-to-1 ratio where harm arose from transaction in economic realm for which jury awarded only damages for emotional distress). In *TXO*, this Court upheld a $10 million award, relying on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded. *Gore*, 517 U.S. at 581 (citing *TXO*, 509 U.S. at 462).

Here, the court of appeals claimed to focus on Ms. Gustafson's harm or potential harm caused by the fraud and

rejected Petitioners' analysis that the exemplary damages were unconstitutionally excessive under this guidepost, considering the ratio between the actual damages resulting from fraud and the exemplary damages awarded as a result of fraud. (App. 15-16a). However, the jury fixed the amount of actual damages resulting from fraud at $500 and awarded $-0- for future damages resulting from the fraud. (App. at 43a).

Concerned that limiting the consideration to the fraud damages (under this element) and not considering the gravity of the misconduct would "pervert" the purpose of exemplary damages, the court held that the exemplary damages award in the ratio of 400-to-1 as capped was "necessary to effectuate the purpose of exemplary damages and that reducing the amount will not punish or deter this egregious conduct," and court noted that the exemplary damages of $200,000 were proportional to the $500. (App. 16a n.4).

Thus, the court of appeals erroneously reconsidered the "gravity of the misconduct" (already considered under the reprehensibility guidepost) and evidence of harm caused by alleged negligence and medical battery under this guidepost, but completely failed to consider the proportion between compensatory damages awarded and exemplary damages, the potential harm to Ms. Gustafson, and the actual harm that occurred. Consequently, the *de novo* review inadequately analyzed this guidepost, and the refusal to compare the compensatory fraud damages with the exemplary fraud damages conflicts with this Court's requirement that such a comparison is significant in the due process analysis. *See Gore*, 116 S. Ct. at 1601.

Here, the shocking disparity between the punitive award and the compensatory award – the 400-to-1 ratio – does not dissipate because there is no showing of potential loss to Ms. Gustafson or anyone else. Accordingly, even considering that

the conduct involved fraud, the disparity between the compensatory fraud damages and the exemplary fraud damages at a ratio of 400-to-1 most assuredly raises a suspicious judicial eyebrow, jars constitutional sensibilities, and compels review.

3. *Court of Appeals Erroneously Disregarded Comparable Civil Monetary Penalties, Focusing on Possible Disciplinary Procedures, in Conflict with Gore and Campbell*

Under the third guidepost, this Court has explained an analysis of civil penalties authorized or imposed in comparable cases, and that the remote possibility of a criminal sanction does not automatically sustain a punitive damages award. *Campbell*, 538 U.S. at 428. When used to determine the dollar amount of an award, the criminal penalty has less utility than the civil penalty. *Id.* The remote possibility of a criminal sanction does not automatically sustain a punitive damages award. *Id.*

The court of appeals considered that Dr. Baribeau's actions could be grounds for discipline by the Texas State Board of Medical Examiners, and that a fine in the form of exemplary damages was less severe punishment than suspension or revocation of Dr. Baribeau's medical license. (App. 16-17a). The court referenced several rules pertaining to the maintenance of medical records – again focusing on the alleged alteration. *See* TEX. STATE BD. OF MED. EXAM'RS, *Board Rules*, 165.1(a), 165.1(d), 190.1(c), 190.1(d) (2002).

The court completely failed to review comparable civil penalties, such as the Texas Deceptive Trade Practices Act, which provides that the trier of fact may award not more than three times the amount of economic damages for the conduct

constituting a false, misleading, or deceptive act or practice.[6] TEX. BUS. & COMM. CODE § 17.50(b)(1) (West 2002).

Under the Board's rules and regulations, the ultimate purpose of disciplinary sanctions is to protect the public, deter future violations, offer opportunities for rehabilitation if appropriate, punish violators, and deter others from violations. TEX. ST. BD. MED. EX. R. 190.14. The maximum sanction in all cases is revocation of the licensee's license, which may be accompanied by an administrative penalty of up to $5,000 per violation. TEX. ST. BD. MED. EX. R. 190.14(3). The standard sanction for failure to maintain adequate medical records is probation for 2 years under terms and conditions, including, but not limited to: (I) competency testing; (II) directed CME; (III) monitoring of practice; and (IV) administrative penalty of $2,000 per violation. TEX. ST. BD. MED. EX. R. 190.14(6)(F). The standard sanction for failure to practice medicine in a professional manner consistent with the public health and welfare which applies in the case of a single patient with no substantial patient harm and no other aggravating or mitigating circumstances is: suspension of license for 3 years; suspension probated after 90 days under terms and conditions (not listed here), and an administrative penalty of $3,000 per violation. TEX. ST. BD. MED. EX. R. 190.14(6)(G). Thus, even under the Board's rules and regulations, civil monetary penalties in the amounts of $5,000, $3,000, or $2,000 were possible under the appropriate circumstance, in addition to any disciplinary action taken on the license.

The court of appeals completely ignored comparable civil monetary penalties that could have been applied under the appropriate circumstances, and failed to appreciate that even

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[6] TEX. BUS. & COMM. CODE § 17.46(2), (3), (4), (5), (24) (Vernon 2002).

under the Board's own rules and regulations, the punishment fines in any event would not exceed $5,000. Even if discipline was an available punishment, it did not achieve this Court's requirement to analyze civil penalties authorized or imposed in comparable cases. *See Campbell*, 538 U.S. at 428. Thus, the court's conclusion that a criminal-type sanction in the form of discipline automatically sustained the award of exemplary damages as capped at $200,000 conflicts with this Court's requirements in *Gore* and *Campbell*, and compels review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

R. BRENT COOPER
DIANA L. FAUST
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Counsel of Record

JULY 2004

Appendix

Court of Appeals March 12, 2003 Opinion

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio
[State Seal]
OPINION
No. 04-01-00732-CV

Alan D. **BARIBEAU**, M.D., and Alan D. Baribeau, M.D., P.A.,
Individually and D/B/A Cataract and Laser Institute, and Center for Laser Enhancement,
Appellants

v.

Lynn **GUSTAFSON**,
Appellee

From the 225th Judicial District Court, Bexar County, Texas
Trial Court No. 99-CI-09658
Honorable John J. Specia, Jr., Judge Presiding

Opinion by: Catherine Stone, Justice
Sitting: Catherine Stone, Justice
Paul W. Green, Justice
Sarah B. Duncan, Justice

Delivered and Filed: March 12, 2003

AFFIRMED

Appellants Alan D. Baribeau, Alan D. Baribeau, M.D., P.A., individually and doing business as the Cataract and Laser Institute, and the Center for Laser Enhancement (collectively referred to as Baribeau) filed a motion for rehearing of our opinion issued November 27, 2002. *See Baribeau v. Gustafson,*

2002 WL 31662059 (Tex.App.–San Antonio Nov. 27, 2002, no pet.h.). Baribeau's motion for rehearing is denied. This court's prior opinion and judgment are withdrawn, and this opinion and judgment are substituted in their place.

Lynn Gustafson and her husband Richard brought claims of battery, fraud, negligence, and negligent misrepresentation against Baribeau.[1] The jury found Baribeau liable on all but the negligent misrepresentation causes of action and awarded actual damages of $127,288.93 and exemplary damages of $250,000. The trial court remitted the exemplary damages award to $200,000 under the cap of the Exemplary Damages Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon Supp. 2002). The exemplary damages award was based on fraud. We affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

Baribeau is an ophthalmologist who began performing Erbium laser skin resurfacing in May of 1997. On May 30, 1997, Lynn met with Baribeau, who suggested an eyelid tuck as well as Erbium laser procedure to even her facial pigment. Although both procedures were scheduled for June 10th, only the Erbium laser was performed. After Lynn was anaesthetized, Baribeau realized the consent form only referenced the Erbium laser and not the eyelid tuck. Baribeau terms this mistake a clerical error, but decided against performing the eyelid tuck that day.

Lynn followed up with Baribeau on June 17th. When shown her broken capillaries and oozing sores, Baribeau informed

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[1] Both Lynn and Richard Gustafson were named parties in the trial court. The jury did not award Richard damages, and he has not appealed that issue. Therefore, Richard Gustafson is not a party to this appeal.

Lynn that she could expect a four-month healing period. At that appointment, Lynn signed a consent form for the eyelid tuck and for additional Erbium laser surgery on a small scar on her chin. Both procedures were scheduled for June 24th. According to Baribeau and Juanita Loya, the nurse present that day, Lynn requested a full-face Erbium laser treatment the morning of the procedure. Baribeau also testified that even though Lynn did not sign a consent form for the second full-face procedure, she verbally consented. Baribeau claims that her skin was sufficiently healed by June 24th when he decided to perform a second full-face procedure, and again described Lynn's lack of written consent as a clerical error.

Lynn denies that she requested the second full-face procedure and argues that she expected only the procedures to which she gave her written consent – the eyelid tuck and the limited Erbium laser on her chin. She testified that when she spoke with Baribeau the morning of the surgery, he stated that he would do the eyelid tuck but would not use the Erbium laser at all. According to Lynn, Baribeau said that he would treat the scar on her chin with steroid injections instead. She testified that at the June 17th appointment, Baribeau told her no further Erbium laser treatments could be performed until her face completely healed, a period he estimated at four months.

The second surgery caused scarring on Lynn's face equivalent to second and third-degree burns. In the ensuing trial, the jury found that Baribeau's negligence proximately caused Lynn's injury; Baribeau performed full-face resurfacing without Lynn's consent (medical battery); and Baribeau committed fraud against Lynn. The jury awarded $126,788.93 for damages caused by Baribeau's negligence and medical battery, and $500 for damages caused by Baribeau's fraud. The jury also determined there was clear and convincing evidence of fraud

and awarded $250,000 in exemplary damages.[2]

Baribeau challenges the judgment of the trial court in fourteen issues. We will address his complaints as three distinct issues.

SUBMISSION OF FRAUD QUESTIONS

Baribeau raises several challenges to the fraud questions.[3]

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[2] The jury failed to find that Baribeau made negligent misrepresentations or that Lynn's husband suffered any damages.

[3] Question four asked the jury the following:

Did Dr. Alan D. Baribeau commit fraud against Lynn Gustafson?

INSTRUCTIONS:

Fraud occurs when

a. a party makes a material misrepresentation,
b. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion,
c. the misrepresentation is made with the intention that it should be acted on by the other party, and the other party acts in the [sic] reliance on the misrepresentation and thereby suffers injury.

"Misrepresentation" means

a. a false statement of fact; or
b. a promise of future performance made with an intent, at the time the promise was made, not to perform as promised.

Fraud also occurs when

a. a party fails to disclose a material fact within the knowledge of that party,
b. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth, and
c. the party intends to induce the other party to take some action by failing to disclose the fact.

Question nine, conditioned upon an affirmative answer to question four and a finding of damages for fraud, is identical to question four,

First, he claims the evidence was legally insufficient to permit submission of the fraud questions. Next, he contends there is legally and factually insufficient evidence to support the jury's answers to those questions. Finally, he claims that the trial court *erred in instructing* the jury on the fraud questions. We affirm the submission of both questions on fraud, determine that legally and factually sufficient evidence supports the jury's answers to both questions, and hold that the trial court did not err in instructing the jury on the fraud questions.

Proper Submission of the Fraud Questions

Litigants are entitled to have controlling and disputed fact issues submitted to the jury. *See Bel-Ton Elec. Serv., Inc. v. Pickle*, 915 S.W.2d 480, 481 (Tex. 1996). Controlling issues must be properly pleaded and supported by some evidence in order to be submitted to the jury. *See* TEX. R. CIV P. 278; *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 718 (Tex. 1995). The propriety of submission of controlling issues in a case is a question of law subject to *de novo* review. *See Cont'l Cas. Co. v. Street*, 379 S.W.2d 648, 651 (Tex. 1964).

Lynn's petition stated several fraud causes of action: one based on actual fraud from Baribeau's misrepresentation of the type of procedure he intended to perform; another based on misrepresentation of his experience with the Erbium laser; a third on theories of constructive fraud; and finally a claim for breach of fiduciary duty. Lynn's attorney withdrew the breach of fiduciary duty claim during the charge conference, and does not challenge its omission on appeal. Therefore, we will only address this argument as it pertains to actual fraud and theories of constructive fraud.

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except that it requires clear and convincing evidence to establish a finding of fraud

The elements of common law fraudulent misrepresentation are:

(1) the defendant made a material representation to the plaintiff;
(2) the representation was false;
(3) the defendant knew of the representation's falsity when it was made;
(4) the defendant made the representation with the intent that the plaintiff act on it; and
(5) the plaintiff detrimentally relied on the defendant's misrepresentation.

See T. O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 222 (Tex. 1992). Lynn testified that before the second procedure, Baribeau told her he would not be using the Erbium laser at all. On the other hand, Baribeau testified that he intended to perform a full-face procedure the morning of June 24th. Evidence of materiality and reliance was established by Lynn's testimony that the first treatment left her skin in such bad condition that she would not have undergone the second surgery had she known that Baribeau intended to perform a second full-face procedure. This conflicting testimony is some evidence of fraud sufficient to raise a fact issue for the jury's consideration, and supports submission of the fraud questions both by a preponderance of the evidence and by clear and convincing evidence.

Legal and Factual Sufficiency

Baribeau challenges the legal and factual sufficiency of the evidence to support the jury's finding of fraud. Lynn had the burden of proving fraud at trial, so Baribeau must demonstrate on appeal that there is no evidence to support the adverse finding. *See* TEX. R. APP. P. 38.1(e). In a no evidence point, the reviewing court considers only the evidence and inferences that tend to support the finding and disregards all evidence and

inferences to the contrary. *See Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 782 (Tex. 2001). If more than a scintilla of evidence supports the finding, the no evidence challenge fails. *See Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc.*, 960 S.W.2d 41 (Tex. 1998).

In a factual sufficiency challenge, this court considers all the evidence supporting and contrary to the judgment. *See Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989).The court reverses only if the evidence supporting the jury's finding is so weak as to be clearly wrong and manifestly unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam). Because Lynn had the burden of proof at trial, Baribeau must prove on appeal that the evidence supporting the jury's finding is clearly wrong. *See Dyson v. Olin Corp.*, 692 S.W.2d 456, 457 (Tex. 1985).

The evidence set out above in support of the judgment should be considered in the sufficiency of the evidence analysis. In addition to testimony given by Baribeau and Lynn, Richard Gustafson testified that he understood his wife's surgery was to be limited to her eyelids and the small scar on her chin. Connie Palonco, a nurse who worked for Baribeau at the time of the surgery, testified that she was present during the conversations between Baribeau and Lynn. Palonco stated that the only other surgery Lynn mentioned was a possible mole removal. Baribeau and his nurse, Juanita Loya, contradicted these statements and testified that Lynn requested the second full-face procedure.

Evidence of fraud maybe inferred from all the circumstances that "makeup the transaction, disclose its true character, explain the acts of the parties, or throw light on their objections and intentions.... Fraud is deducible from artifice and concealment as well as from affirmative conduct of a character to deceive." *Campbell v. Booth*, 526 S.W.2d 167, 169 (Tex.Civ.App.–Dallas

1975, writ ref'd. n.r.e.). Lynn presented evidence that Baribeau falsified records in an effort to conceal his earlier misrepresentations. To support this allegation, she pointed to the fact that the operative report from her first procedure was missing, including the "after" photos which would have shown the condition of Lynn's face one week before the second procedure.

Lynn also produced conflicting documents from her medical records. Baribeau gave Lynn medical records with no notations on them in September of 1997, less than four months after her procedures. Baribeau used what were supposedly the same medical records during the June 2001 trial. The records Baribeau relied upon at trial, however, included various notations that placed him on stronger legal footing. For instance, the record from the June 17th appointment stated, "Mrs. Gustafson feels not enough laser was done and wants to discuss more being done along with having her lids done," and "she would like more laser Tx. done for better results." No such notation was made on that same document when it was produced to Lynn four months after her surgery. Additionally, the laser log for the second procedure shows that the limited Erbium laser to the chin was the only surgery to be performed. Six weeks later, however, Baribeau modified the document to reflect performance of the full-face procedure. This is sufficient evidence to support the jury's findings of fraud both by a preponderance of the evidence and by clear and convincing evidence.

Submission of the Fraud Instructions

The trial court possesses significantly more discretion in submitting instructions and definitions than it has in submitting questions. *See Allen v. Allen*, 966 S.W.2d 658, 659 (Tex.App.–San Antonio 1998, pet. denied). The objecting party "must point out distinctly the objectionable matter and the

grounds of the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading is waived unless specifically included in the objections." TEX. R. CIV. P. 274. A trial court's submission of a theory by instruction rather than question is reviewed for an abuse of discretion. *See Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990).

Baribeau argues that the broad-form fraud questions include two instructions on fraud, one of which is improper. However, his objection at the charge conference was simply that "(t)here is also no evidence to support the submission of Question Number four on fraud, and, furthermore, by submitting fraud and negligence, it amounts to a comment on the weight of the evidence by having these theories in there together." He made no other objections to question four and only made a no evidence objection to question nine on exemplary damages from fraud. These objections did not put the trial court on notice of Baribeau's complaint, so he cannot raise it for the first time on appeal. *See* TEX. R. APP. P. 33.1; *Crown Life. Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000).

RECASTING OF THE MEDICAL BATTERY CLAIM AS FRAUD

Baribeau contends the two fraud issues submitted to the jury were merely a recasting of question two, the medical battery question. He contends the underlying facts supporting the battery and fraud claims are the same and that permitting recovery on both violates the one satisfaction rule. *See Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 7 (Tex. 1991). We disagree.

When a plaintiff pleads alternate theories of liability, judgment awarding damages on more than one theory may stand if the theories of liability arise from separate and distinct injuries and separate and distinct damage findings are entered

on each theory of liability. *See Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 367 (Tex. 1987).

Under the Penal Code, the common law actions of assault and battery are addressed simply as assault. *See* TEX. PEN. CODE ANN. § 22.01(a) (Vernon Supp. 2002). The elements for assault are the same in civil and criminal cases. *See Wal-Mart Stores, Inc. v. Odem*, 929 S.W.2d 513, 523 (Tex.App.–San Antonio 1996, writ denied). Therefore, battery occurs when a person "intentionally, knowingly, or recklessly causes bodily injury to another...." TEX. PEN. CODE ANN. § 22.01(a) (Vernon 2002). Battery in the health care context generally involves claims that a doctor performed acts on the patient without consent. *See Roberts v. Southwest Tex. Med. Hosp.*, 811 S.W.2d 141, 144 (Tex.App.–San Antonio 1991, writ denied). Recovery for battery is premised upon an injurious contact between the parties. *See ONI, Inc. v. Swift*, 990 S.W.2d 500, 503 (Tex.App–Austin 1999, no pet.). Recovery on a fraud allegation is based on material misrepresentation and detrimental reliance. *See T.O. Stanley Boot*, 847 S.W.2d at 222.

In her recovery for negligence and battery, the jury awarded Lynn damages of $126,788.93 for past physical pain and mental anguish, medical expenses, disfigurement, and loss of earnings and earning capacity. The jury awarded $500 for past pecuniary loss from Baribeau's fraud. Lynn's battery injuries are that an unwanted touch of her body occurred. Her fraud injuries stem from her reliance on Baribeau's assurance that he would not use the Erbium laser during the second surgery. The injuries resulting from Lynn's reliance on Baribeau's misrepresentations are separate and distinct from her injuries arising from Baribeau's unauthorized bodily contact. *See Birchfield*, 747 S.W.2d at 367. We hold that Lynn's recovery for both fraud and battery does not violate the one satisfaction rule.

EXEMPLARY DAMAGES AWARD

Baribeau raises several challenges to the award of exemplary damages. He claims the award is excessive, not supported by legally or factually sufficient evidence, and violates his due process rights under the Fourteenth Amendment. This court reviews the excessiveness of an exemplary damages award as a factual sufficiency challenge. *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406 (Tex. 1998). We turn first to the factual sufficiency issue, as it answers Baribeau's first three questions on exemplary damages. This court considers all the evidence supporting and contrary to the judgment and may reverse or suggest a remittitur only if the exemplary damages award is so against the great weight and preponderance of the evidence as to be manifestly unjust. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994).

The Legislature created the Exemplary Damages Act to punish and deter wrongful conduct. *See Moriel*, 879 S.W.2d at 16. To recover exemplary damages when more than one cause of action is asserted, the party seeking exemplary damages must obtain at least one finding of an independent tort with accompanying actual damages. *See Tex. Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1986). Two policy-based reasons support this prerequisite. First, the comparison indicates whether the jury's award was based on passion rather than reason. *See Wright v. Gifford-Hill & Co., Inc.*, 725 S.W.2d 712, 714 (Tex. 1987). Second, the law will not punish even the most heinous conduct if that conduct does not cause an injury. *Id.* Although no set ratio exists to determine the appropriateness of an exemplary damages award, the Civil Practice and Remedies Code sets out factors to consider, including:

(1) the nature of the wrong;
(2) the character of the defendant's conduct;
(3) the degree of the defendant's culpability;

(4) the situation and sensibilities of the parties;
(5) the extent to which the conduct offends the public sense of justice and propriety; and
(6) the net worth of the defendant.

TEX.CIV.PRAC.&REM CODE ANN. § 41.011 (Vernon 1997); *see also Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981).

The nature of the wrong refers to the injury or harm caused by the defendant's actions. *See Apache Corp. v. Moore*, 960 S.W.2d 746, 748 (Tex.App.–Amarillo 1997, writ denied). Lynn's physician testified that her scars are the same as if someone put a cigar out on her face. The laser penetrated her skin at a level so deep that it killed the cells that create pigment. Her face, neck, and chest are peppered with white blotches where pigment can no longer be produced. As of the time of trial, she could not go outdoors in the daytime and wore corrective stage make-up. Her physician testified that several reconstructive surgeries would be required to correct the scars left on her face. Lynn was also emotionally scarred; Baribeau diagnosed her with depression and placed her on anti-depressant medication after the second surgery. The harm caused by Baribeau's actions is severe and permanent. We believe this factor supports the exemplary damages award.

Turning to the character of the defendant's conduct and the degree of the defendant's culpability, Lynn testified that Baribeau misrepresented the number of Erbium laser procedures he previously performed. This misrepresentation was especially harmful, as Lynn's treating physician testified, because one with experience in these procedures should know the length of time required for skin to heal between procedures. Baribeau himself testified that Lynn's skin had not sufficiently healed when he performed the second procedure. He also represented to Lynn that he would not perform any additional

work with the Erbium laser during Lynn's second surgery. Baribeau's fraudulent misrepresentation about the extent of the procedure he intended to perform essentially prevented Lynn from making an informed choice about her medical treatment. Lynn testified that she would not have undergone the second procedure if she had been informed that Baribeau intended to perform a full face Erbium treatment. As a result of Baribeau's fraudulent misrepresentation, she was subjected to treatment to which she did not consent and which was performed negligently. The facts of this case present a "but for" causation of Lynn's damages: but for Baribeau's fraud, Lynn would not have undergone the additional procedure which the jury determined was negligently performed and which caused severe injuries. In short, Baribeau's fraudulent misrepresentations engendered Lynn's trust and placed her in the position where the negligence occurred. This conduct likewise supports the award of exemplary damages.

We also consider the situation and sensibilities of the parties in determining the excessiveness of an exemplary damages award. This factor is closely associated with the defendant's net worth, and weighs the profitability of the wrongful conduct and the size of the award necessary to punish and deter that conduct. *See Owens-Corning Fiberglass* [last "s" in Fiberglass marked through] *Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). Here, the record is devoid of evidence of Baribeau's net worth or the amount he profited from performing Lynn's second Erbium procedure. However, as Baribeau freely admitted, altering medical records is never appropriate. Baribeau's own medical expert also testified that a breach of trust between doctor and patient affects more than that solitary relationship; it impacts the medical community at large. To properly punish Baribeau's malfeasance and deter others from breaching the same trust, an exemplary damages award like this is not only appropriate, but also necessary.

After reviewing Baribeau's testimony, it is apparent that his conduct offends the public's sense of justice and propriety. First, Baribeau's misrepresentations deprived Lynn from making informed choices about her medical care, a most basic valued right in our society. Second, Baribeau admittedly altered Lynn's medical records after he had reason to know that Lynn would file suit. While on the stand, Baribeau testified that it is never appropriate to alter medical records, but then admitted to inserting language in Lynn's medical records that placed him on higher legal ground. Third, Baribeau testified that his computer system was sophisticated and records in it could not be altered after they were entered. When confronted with records from that computer system that were admittedly altered months after Lynn's surgeries, Baribeau's response was that the records had to be altered because his cosmetologist "was Mexican, some of her word sentences structure were not exactly the way English is." Although this evidence is offensive, in light of all the other evidence produced at trial, we do not believe it to have caused the jurors to cast their votes based on passion rather than reason.

The jury was properly instructed on the *Kraus* factors codified in the Exemplary Damages Act, and the record contains competent evidence to support the exemplary damages award. We hold that factually sufficient evidence supports the jury's award of exemplary damages. Evidence which is factually sufficient is also necessarily legally sufficient. *See British Am. Ins. Co. v. Howarton*, 877 S.W.2d 347, 352 (Tex.App.–Houston [1st Dist.] 1994, writ dism'd by agr.). The exemplary damages award therefore survives both the legal and factual sufficiency challenges.

Finally, Baribeau challenges the exemplary damages award on the ground that it deprives him of due process under the Fourteenth Amendment to the United States Constitution. Even if an exemplary damages award is not excessive under

governing state law, it may violate a party's substantive due process right to protection from "grossly excessive" damages. *See BMW. of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). Like criminal punishment, exemplary damages require appropriate procedural and substantive safeguards to minimize the risk of unjust punishment. *Moriel*, 879 S.W.2d at 30. In the civil arena, the Due Process Clause limits states' discretion in two ways: first, by requiring notice of the type of conduct which may subject a defendant to punishment; and second, by requiring notice of the severity of the penalty a state may impose for that conduct. *See id.* To determine whether an exemplary damages award violates due process, the Texas Supreme Court has adopted the guideposts set forth by the Supreme Court of the United States, including:

(1) the degree of reprehensibility of the defendant's misconduct;
(2) the disparity between actual and punitive damages; and
(3) a comparison of the punitive damages awarded and other civil or criminal penalties that could be imposed for similar misconduct.

Malone, 972 S.W.2d at 45.

The Texas Supreme Court views the reprehensibility of the defendant's conduct as the most important indicia of the reasonableness of the award, and we do not disagree. *See id.* at 46. In the instant case, the record reflects that Baribeau not only deliberately misled Lynn, but he also attempted to conceal his misrepresentations. We view his practice of altering Lynn's medical records equally repugnant as his misrepresentations. The reprehensibility of Baribeau's actions supports the exemplary damages award.

Turning to the second guidepost, we believe that the disparity between the exemplary damages and Lynn's harm or potential harm also supports the award. Baribeau asserts that the ratio

between exemplary damages and actual damages awarded by the jury requires a reduction in the exemplary damages award. This argument is that the punishment should not fit the conduct, but instead should only fit the damages awarded. Instead, we believe that the penalty should fit the gravity of the misconduct, not simply the actual damages awarded by a jury.[4] To accept Baribeau's argument would pervert the purpose of the exemplary damages scheme. Exemplary damages do not make an individual whole, but rather punish and deter contemptible conduct. *See Malone*, 972 S.W.2d at 39-40. Baribeau's proposed rule would require this and other courts to reduce exemplary damage awards to the point where they might have no realistic possibility of deterring or punishing conduct the law deems outrageous. We believe this exemplary damages award is necessary to effectuate the purposes of exemplary damages, and that reducing the amount will not punish or deter this egregious conduct.

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[4] The Supreme Court of the United States, in *TXO Prod Corp. v. Alliance Res. Corp.*, expounded on the problem exemplary damages present when a small amount of actual damages are awarded. "For instance, a man wildly fires a gun into a crowd. By sheer chance, no one is injured and the only damage is to a $10 pair of glasses. A jury could reasonably find only $10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care. We would allow a jury to impose substantial punitive damages in order to deter future bad acts." *TXO*, 509 U.S. at 459-60. This case likewise presents an instance of low damages and high culpability. We believe the exemplary damages assessed against Baribeau are necessary to teach a duty of care and deter future bad acts. For that reason, we believe that the $200,000 in exemplary damages is proportional to the $500 in damages the jury attributed to Baribeau's fraud. We believe that effectuating the purposes of exemplary damages is of paramount importance and eclipses any concern about reducing the ratio between exemplary and actual damages.

Finally, we examine comparable civil penalties Baribeau could have faced. Here, Baribeau' s actions may be grounds for discipline by the Board of Medical Examiners. *See* TEX. STATE BD. OF MED. EXAMIN'RS, *Board Rules*, 165.1(a); 165.1(d); 190.1(c); 190.1(d) (Sept. 19, 2002), *http://www.tsbme.state.tx.us/rules/rules/bdrules.htm* (last visited March 11, 2003). We believe a fine in the form of exemplary damages to be a less severe punishment than suspension or revocation of Baribeau's medical license. The exemplary damages award survives the third prong of the Due Process challenge. We hold that the award of exemplary damages in this case does not violate Baribeau's due process rights. Accordingly, Baribeau' s final issue is overruled.

The judgment of the trial court is affirmed.

Catherine Stone, Justice

Publish

Court of Appeals March 12, 2003 Judgment

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio
[State Seal]
JUDGMENT
No. 04-01-00732-CV

Alan D. **BARIBEAU**, M.D., and Alan D. Baribeau, M.D., P.A.,
Individually and D/B/A Cataract and Laser Institute, and Center for Laser Enhancement,
Appellants
v.
Lynn **GUSTAFSON**,
Appellee

From the 225th Judicial District Court, Bexar County, Texas
Trial Court No. 99-CI-09658
Honorable John J. Specia, Jr., Judge Presiding

BEFORE JUSTICE STONE, JUSTICE GREEN, AND JUSTICE DUNCAN

In accordance with this Court's opinion of this date, the judgment of the trial court is AFFIRMED. It is ORDERED that appellee LYNN GUSTAFSON recover costs of this appeal from appellants ALAN D. BARIBEAU, M.D., and ALAN D. BARIBEAU, M.D., P.A., INDIVIDUALLY AND D/B/A CATARACT AND LASER INSTITUTE, and CENTER FOR LASER ENHANCEMENT.

SIGNED March 12, 2003.

"s/Catherine Stone".

Catherine Stone
Justice

District Court July 20, 2001 Judgment

CAUSE NO. 99-CI-09658

LYNN GUSTAFSON AND	§	IN THE DISTRICT COURT
RICHARD GUSTAFSON	§	
PLAINTIFFS	§	
	§	
VS.	§	288th JUDICIAL DISTRICT
	§	
ALAN D. BARIBEAU, M.D	§	
AND ALAN D. BARIBEAU	§	
M.D., P.A., INDIVIDUALLY	§	
AND D/B/A CATARACT	§	
AND LASER INSTITUTE	§	
AND CENTER FOR LASER	§	
ENHANCEMENT	§	
DEFENDANTS	§	BEXAR COUNTY, TEXAS

JUDGMENT

The Court finds that the verdict of the jury was for Plaintiff Lynn Gustafson and against the Defendants, Alan D. Baribeau, M.D. and Alan D. Baribeau, M.D., P.A., Individually and d/b/a Cataract and Laser Institute and Center For Laser Enhancement, and, therefore, judgment should be rendered in favor of Lynn Gustafson and against Alan D. Baribeau, M.D. and Alan D. Baribeau, M.D., P.A, Individually and d/b/a Cataract and Laser Institute and Center For Laser Enhancement. Based on the jury's answers to question nos. 1, 2, 4, 5, 8, 9 and 10 in the verdict and the applicable law, it is, therefore, ORDERED, ADJUDGED and DECREED:

1. Lynn Gustafson shall have and recover from Alan D. Baribeau, M.D. and Alan D. Baribeau, M.D., P.A., Individually and d/b/a Cataract and Laser Institute and Center For Laser Enhancement the sum of $127,288.93 as compensatory

damages;

2. Lynn Gustafson shall have and recover from Alan D. Baribeau, M.D. and Alan D. Baribeau, M.D., P.A., Individually and d/b/a Cataract and Laser Institute and Center For Laser Enhancement the sum of $24,439.47 as pre-judgment interest on compensatory damages calculated as simple interest as the rate of ten percent (10%);

3. Lynn Gustafson shall have and recover from Alan D. Baribeau, M.D. and Alan D. Baribeau, M.D., P.A., Individually and d/b/a Cataract and Laser Institute and Center For Laser Enhancement the sum of $ $200,000.00 as exemplary damages;

4. The total judgment entered herein is $351,728.40;

5. Lynn Gustafson shall have and recover from Alan D. Baribeau, M.D. and Alan D. Baribeau, M.D., P.A., Individually and d/b/a Cataract and Laser Institute and Center For Laser Enhancement the total amount of $351,728.40 as of the date of this Judgment;

6. This Judgment (the $351,728.40 due Plaintiff Lynn Gustafson) shall bear interest at the rate of ten percent (10%), compounded annually, from this date until paid;

7. All costs expended or incurred in this case ($3,769.35 to date) are assessed against Alan D. Baribeau, M.D. and Alan D. Baribeau, M.D., P.A., Individually and d/b/a Cataract and Laser Institute and Center For Laser Enhancement, together with post-judgment interest thereon at the rate of ten percent (10%) per annum from the date of signing this judgment until collection and compounded annually;

8. The total amount of this Judgment for which post-judgment interest shall run upon entry of this Judgment is $355,497.75 ($351,728.40 due Plaintiff Lynn Gustafson plus court costs to date in the amount of $3,769.35);

9. Plaintiff Richard Gustafson shall take nothing by his suit against Defendants, Alan D. Baribeau, M.D. and Alan D. Baribeau, M.D., P.A., Individually and d/b/a Cataract and Laser Institute and Center For Laser Enhancement; and,

10. All writs and processes for the enforcement and collection of this Judgment may issue as necessary, and the Court orders execution to issue for this Judgment.

All relief not granted herein is denied.

Signed this [20] day of [July], 2001.

"s/John J. Specia, Jr.".
HONORABLE JOHN J. SPECIA, JR.
225TH JUDICIAL DISTRICT COURT
BEXAR COUNTY, TEXAS

APPROVED AS TO FORM ONLY:
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ATTORNEYS FOR PLAINTIFFS

Texas Supreme Court January 30, 2004 letter denying petition for review

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
[State Seal] (512) 463-1312

January 30, 2004

Diana L. Faust
Cooper & Scully, PC
900 Jackson Street, Suite 100
Dallas, TX 75202

Mr. James Daniel George
The Law Offices of Powless & George, P.C.
8632 Fredericksburg Road, Suite 200
San Antonio, TX 78240

RE: Case Number: 03-0375
Court of Appeals Number: 04-01-00732-CV
Trial Court Number: 1999-CI-09658

Style: ALAN D. BARIBEAU, M.D., AND ALAN D. BARIBEAU, M.D., P.A., INDIVIDUALLY AND D/B/A CATARACT AND LASER INSTITUTE, AND CENTER FOR LASER ENHANCEMENT
v.
LYNN GUSTAFSON

Dear Counsel:

Today, the Supreme Court of Texas denied as amended the petition for review in the above styled case.

Sincerely,

"s/Andrew Weber".
Andrew Weber, Clerk
by Nancy J. Vega, Chief Deputy Clerk

cc: Mr. Reagan Greer Clerk
Mr. Herb Schaefer

Texas Supreme Court April 9, 2004 letter denying motion for rehearing

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
[State Seal] (512) 463-1312

April 9, 2004

Diana L. Faust
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Dallas, TX 75202

Mr. James Daniel George
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8632 Fredericksburg Road, Suite 200
San Antonio, TX 78240

RE: Case Number: 03-0375
Court of Appeals Number: 04-01-00732-CV
Trial Court Number: 1999-CI-09658

Style: ALAN D. BARIBEAU, M.D., AND ALAN D. BARIBEAU, M.D., P.A., INDIVIDUALLY AND D/B/A CATARACT AND LASER INSTITUTE, AND CENTER FOR LASER ENHANCEMENT
v.
LYNN GUSTAFSON

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing of the above referenced petition for review.

Sincerely,

"s/Andrew Weber".
Andrew Weber, Clerk
by Nancy J. Vega, Chief Deputy Clerk

cc: Mr. Reagan Greer Clerk
Mr. Herb Schaefer

STATUTORY PROVISIONS

(Texas Civil Practice & Remedies Code Section 41.008.)

§ 41.008. LIMITATION ON AMOUNT OF RECOVERY.

(a) In an action in which a claimant seeks recovery of exemplary damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.

(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

(1)(A) two times the amount of economic damages; plus
(B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or
(2) $200,000.

(c) Subsection (b) does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally:

(1) Section 19.02 (murder);
(2) Section 19.03 (capital murder);
(3) Section 20.04 (aggravated kidnapping);
(4) Section 22.02 (aggravated assault);
(5) Section 22.011 (sexual assault);
(6) Section 22.021 (aggravated sexual assault);
(7) Section 22.04 (injury to a child, elderly individual, or disabled individual;
(8) Section 32.21 (forgery);
(9) Section 32.43 (commercial bribery);
(10) Section 32.45 (misapplication of fiduciary property or property of financial institution);

(11) Section 32.46 (securing execution of document by deception);
(12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);
(13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;
(14) Section 49.07 (intoxication assault); or
(15) Section 49.08 (intoxication manslaughter).

(d) In this section, 'intentionally' and 'knowingly' have the same meanings assigned those terms in Sections 6.03(a) and (b), Penal Code.

(e) The provisions of subsections (a) and (b) may not be made known to a jury by any means, including voir dire, introduction into evidence, argument, or instruction.

Charge of the Court - June 12, 2001 - Trial Court

CAUSE NO. 99-CI-09658

LYNN GUSTAFSON AND	§	IN THE DISTRICT COURT
RICHARD GUSTAFSON	§	
PLAINTIFFS	§	
	§	
VS.	§	225th JUDICIAL DISTRICT
	§	
ALAN D. BARIBEAU, M.D	§	
AND ALAN D. BARIBEAU	§	
M.D., P.A., INDIVIDUALLY	§	
AND D/B/A CATARACT	§	
AND LASER INSTITUTE	§	
AND CENTER FOR LASER	§	
ENHANCEMENT	§	
DEFENDANTS	§	BEXAR COUNTY, TEXAS

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have

been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a minority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

7. The presiding juror or any other who observes a violation

of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

8. When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

9. Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence.

10. A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

QUESTION NO. [1]:

Did the negligence, if any, of Dr. Alan D. Baribeau proximately cause the occurrence or injury in question?

"**Negligence**," when used with respect to the conduct of Dr. Alan D. Baribeau, means failure to use ordinary care, that is, failing to do that which a physician of ordinary prudence would have done under the same or similar circumstances or doing that which a physician of ordinary prudence would not have done under the same or similar circumstances.

"**Ordinary Care**," when used with respect to the conduct of Dr. Alan D. Baribeau, means that degree of care that a physician of ordinary prudence, possessing and exercising a reasonable degree of skill and learning in facial resurfacing, would use under the same or similar circumstances.

"**Proximate Cause**," when used with the respect to the conduct of Dr. Alan D. Baribeau, means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a physician using ordinary care would have foreseen that the event or some similar event might reasonably result therefrom. There may be more than one proximate cause of an event.

Answer "Yes" or "No."

Answer: [Yes]

QUESTION NO. [2]:

Did Dr. Alan D. Baribeau, without Lynn Gustafson's consent, perform a near full face resurfacing with the Erbium Laser on Lynn Gustafson on June 24, 1997?

Answer "Yes" or "No."

Answer: [Yes]

QUESTION NO. [3]:

Did Dr. Alan D. Baribeau make a negligent misrepresentation on which Lynn Gustafson justifiably relied?

Negligent misrepresentation occurs when-

(a) a party makes a representation in the course of his business or in a transaction in which he has a pecuniary interest,

(b) the representation supplies false information for the guidance of others in their business, and

(c) the party making the representation did not exercise reasonable care or competence in obtaining or communicating the information.

Answer "Yes" or "No."

Answer: [No]

QUESTION NO. [4]:

Did Dr. Alan D. Baribeau commit fraud against Lynn Gustafson?

INSTRUCTIONS:

Fraud occurs when

a. a party makes a material misrepresentation,

b. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion,

c. the misrepresentation is made with the intention that it should be acted on by the other party, and

d. the other party acts in the reliance on the misrepresentation and thereby suffers injury.

"Misrepresentation" means

a. a false statement of fact; or

b. a promise of future performance made with an intent, at the time the promise was made, not to perform as promised.

Fraud also occurs when

a. a party fails to disclose a material fact within the knowledge of that party,

b. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth, and

c. the party intends to induce the other party to take some action by failing to disclose the fact.

Answer "Yes" or "No."

Answer: [Yes]

INSTRUCTIONS AS TO DAMAGES QUESTIONS:

If you answer questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of the instructions in or your answers to any other questions about damages. Do not speculate about what if any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

If you have answered "Yes" to either Question No. [1] or Question No. [2], then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. [5]:

What sum of money, if paid now in cash, would fairly and reasonably compensate Lynn Gustafson for her injuries, if any, that resulted from the occurrence or injury in question?

Consider the elements of damage listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.

Answer in dollars and cents for the following elements of damages, if any:

Element a. Physical Pain and mental anguish.

"Physical pain and mental anguish" means the conscious physical pain and emotional pain, torment, and suffering experienced by Lynn Gustafson as a result of the occurrence or injury in question.

sustained in the past **$[$50,000.00].**

in reasonable probability will be sustained in the future **$[0].**

Element b. Medical expenses.

"Medical expenses" means the reasonable expense of the necessary medical and hospital care received by Lynn Gustafson for treatment of injuries sustained by her as a result of the occurrence or injury in question.

sustained
in the past **$[$22,685.10].**

in reasonable probability
will be sustained in the
future **$[$12,575.00].**

Element c. **Disfigurement**

sustained
in the past **$[$30,000.00].**

in reasonable probability
will be sustained in the
future **$[0].**

Element d. **Loss of earnings/earning capacity.**

sustained
in the past **$[$11,528.83/100].**

If you have answered "yes" to either [marked out and initialed] Question No. [1] then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. [6]:

What sum of money, if paid now in cash, would fairly and reasonably compensate Richard Gustafson for injuries, if any, to his wife, Lynn Gustafson, that resulted from the occurrence or injury in question?

Consider the element of damage listed below and none other. Do not include interest on any amount of damages you find.

Loss of Consortium.

"Consortium" means the mutual right of the husband and wife to that affection, solace, comfort, companionship, society, assistance, sexual relations, emotional support, love, and felicity necessary to a successful marriage as a result of the occurrence or injury in question.

Answer in dollars and cents for the following elements of damages, if

sustained in the past	**$[-0-].**
in reasonable probability will be sustained in the future	**$[-0-].**

If your answer to Question No. 3 is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 7:

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Lynn Gustafson for her damages, if any, that were proximately caused by such negligent misrepresentation?

Consider the following element of damages, if any, and none other.

The difference, if any, between the value of what Lynn Gustafson has received in the transaction and the purchase price or value given.

The pecuniary loss, if any, otherwise suffered as a consequence of Lynn Gustafson's reliance on the misrepresentation.

Do not add any amount for interest on past damages, if any.

Answer in dollars and cents for damages, if any that were

sustained in the past $_____.

in reasonable probability will be sustained in the future $_____.

If your answer to Question No. [4] is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. [8]:

What sum of money, if any, if paid now in cash would fairly and reasonably compensate Lynn Gustafson for her damages, if any, that resulted from such fraud?

Consider the elements of damage listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.

Answer in dollars and cents for the following elements of damages, if any:

Element a. Physical Pain and mental anguish.

"Physical pain and mental anguish" means the conscious physical pain and emotional pain, torment, and suffering experienced by Lynn Gustafson as a result of the occurrence or injury in question.

sustained in the past **$ [- 0 -].**

in reasonable probability will be sustained in the future **$[- 0 -].**

Element b. Medical expenses.

"Medical expenses" means the reasonable expense of the necessary medical and hospital care received by Lynn Gustafson for treatment of injuries sustained by her as a result of the occurrence or injury in question.

sustained

in the past **$ |- 0 -|.**

in reasonable probability will be sustained in the future **$|- 0 -|.**

Element c. **Disfigurement.**

sustained in the past **$ |- 0 -|.**

in reasonable probability will be sustained in the future **$|- 0 -|.**

Element d. **Loss of earnings/earning capacity.**

sustained in the past **$ |- 0 -|.**

Element e. **Pecuniary Loss.**

The difference, if any, between the value of what Lynn [spelling corrected and initialed] Gustafson has received in the transaction and the purchase price or value given.

The pecuniary loss, if any, otherwise suffered as a consequence of Lynn Gustafson's reliance on the misrepresentation.

sustained in the past **$ |$500.00|.**

in reasonable probability will be sustained in the future **$|- 0 -|.**

If your answer to Question No. [4] was "Yes", and you have inserted a sum of money in answer to Question No. [8], then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 9:

Do you find by clear and convincing evidence, that Dr. Alan D. Baribeau committed fraud against Lynn Gustafson?

"Clear and convincing evidence" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

INSTRUCTIONS:

Fraud occurs when

a. a party makes a material misrepresentation,

b. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion,

c. the misrepresentation is made with the intention that it should be acted on by the other party, and

d. the other party acts in the reliance on the misrepresentation and thereby suffers injury.

"Misrepresentation" means

a. a false statement of fact; or

b. a promise of future performance made with an intent, at the time the promise was made, not to perform as promised.

Fraud also occurs when

a. a party fails to disclose a material fact within the knowledge of that party,

b. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth, and

c. the party intends to induce the other party to take some action by failing to disclose the fact.

Answer "Yes" or "No."

Answer: [Yes]

If your answer to Question No. [9] is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION NO.10:

What sum of money, if any, if paid now in cash, should be assessed against Dr. Alan D. Baribeau and awarded to Plaintiffs as exemplary damages, if any, for the conduct found in response to Question No. [9].

"EXEMPLARY DAMAGES" means any damages awarded as a penalty or by way of punishment. Exemplary damages includes punitive damages.

In determining the amount of exemplary damages you should consider evidence, if any, relating to:

a. The nature of the wrong.

b. The character of the conduct involved.

c. The degree of culpability of the wrongdoer.

d. The situation and sensibilities of the parties concerned.

e. The extent to which such conduct offends a public sense of justice and propriety.

f. The net worth of the Dr. Alan D. Baribeau.

Answer in dollars and cents, if any.

ANSWER: $[$250,000.00]

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror-

to preside during your deliberations,

to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,

to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,

to vote on the questions,

to write your answers to the questions in the space provided, and

to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should any-one attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have

reached a verdict, and then you will return into court with your verdict.

"s/John J. Specia, Jr.".
HONORABLE JUDGE JOHN J. SPECIA, JR.

Certificate

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

"s/Lawrence Pisani".
Presiding Juror

(To be signed by the Presiding Juror rendering the verdict if unanimous.)

"s/Joseph H. Farrar".
"s/Miguel A. Constancio".
"s/Regan Avery".
"s/Carol Banks".
"s/Marry Davilla".
"s/Alma S. Herrera".
"s/Yvette Galvan".
"s/Juanita Montoya".
"s/Ernest Tafolla".
"s/Michael J. Gill".

Filed
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Bexar Co. Texas
01 Jun 12 PM 1:18
Deputy
By: "s/Roger Lewis".

Trial Court - 9/28/01 - Order Denying Motion for New Trial

CAUSE NO. 99-CI-09658

LYNN GUSTAFSON AND	§	IN THE DISTRICT COURT
RICHARD GUSTAFSON	§	
PLAINTIFFS	§	
	§	
VS.	§	288th JUDICIAL DISTRICT
	§	
ALAN D. BARIBEAU, M.D	§	
AND ALAN D. BARIBEAU	§	
M.D., P.A., INDIVIDUALLY	§	
AND D/B/A CATARACT	§	
AND LASER INSTITUTE	§	
AND CENTER FOR LASER	§	
ENHANCEMENT	§	
DEFENDANTS	§	BEXAR COUNTY, TEXAS

ORDER

1. Defendants' Motion For New Trial Or, In The Alternative, Motion For Remittitur is hereby DENIED.

2. All relief not granted herein is DENIED. [Marked out and initialed J.S.]

Signed this [28] day of [September], 2001.

"s/ John J. Specia, Jr.".
HONORABLE JOHN J. SPECIA, JR.
225TH JUDICIAL DISTRICT COURT
BEXAR COUNTY, TEXAS